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89-621

FILED
OCT 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

BOB MARTINEZ, et al.,

Petitioners,

v.

JEFFREY RASKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' APPENDIX

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Jeffrey RASKE, Petitioner-Appellee,

v.

Bob MARTINEZ, Governor, State of Florida, and Richard Dugger, Secretary, Department of Corrections, Respondents-Appellants.

No. 88-3101

United States Court of Appeals
Eleventh Circuit

July 11, 1989

Before TJOFLAT and EDMONDSON, Circuit Judges, and ATKINS* , Senior District Judge.

TJOFLAT, Circuit Judge:

Under Florida law, a prisoner who behaves well and diligently performs assigned work can reduce his term of incarceration by earning "gain time." In the district court, petitioner Jeffrey Raske, an inmate in the Florida prison system,

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

sought a writ of habeas corpus, claiming that a 1983 Florida statute which altered the amount and calculation of gain time constituted an unconstitutional *ex post facto* law as applied to prisoners such as himself who were convicted of offenses that occurred prior to the statute's passage. *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law. . . . ").[1] The district court granted the writ, and the State of Florida now appeals. We affirm.

I.

Raske is presently serving three concurrent twenty-five year prison sentences

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[1] The Supreme Court has held that "two critical conditions must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981)(footnotes omited).

imposed by the circuit court of Broward County, Florida, for a series of robberies that occurred in 1982.[2] At the time of Raske's offenses, Florida law provided the following formula for the calculation of gain time:

> (1) The [Department of Corrections] shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentences of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the

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[2] Raske was also convicted of another 1982 robbery by the circuit court of Palm Beach County, Florida. For that robbery, Raske received a three and one-half year sentence, which he served concurrently with the three twenty-five year sentences imposed by the Broward County court.

work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence. . . .

[2](b) The department is authorized to grant additional gain-time allowances on a monthly basis as earned up to one day for each day of productive or institutional labor performed by any prisoner . . . who has accomplished in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be

awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

. . . .

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him . . . may be granted on an individual basis from one to six days per month extra gain-time to be deducted from the term of his sentence.

Act of June 16, 1978, ch. 304, § 1, 1978 Fla.Laws 870, 870-71 (codified, as amended, at Fla.Stat. § 944.275 (1979-81))[hereinafter the 1978 act].[3] Thus, under the 1978 act, prisoners who dili-

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[3] In Florida, the state agency in charge of prisons is the Department of Corrections. *See* Fla.Stat. § 944.023 (1987). Our opinion will refer to this agency as "the department."

gently performed their assigned duties could earn up to forty-six days of gain time each month.[4]

In 1983, the Florida legislature amended section 944.275 to provide as follows:

> (1) The [department] is authorized to grant deductions form sentence in the form of gain-time to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities and to reward prisoners who perform outstanding deeds or services.
>
> . . . .

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[4] A well-behaving prisoner serving the fifth year of his sentence would receive nine days of basic gain time under Fla.Stat. § 944.275(1)(c)(1981) and in addition to those nine days could receive up to thirty-seven days of incentive gain time under Fla.Stat. § 944.274(2)(b) and (3)(a)(1981) for diligent or exceptional performance of his assigned duties.

(4)(a) As a means of encouraging satisfactory behavior, the department shall grant basic gain-time at the rate of 10 days for each month of each sentence imposed on a prisoner. . . .

(b) For each month a prisoner works diligently . . . the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly.

. . . .

(5) When a prisoner is found guilty of an infraction of the laws of this state, or the rules of the department, gain-time may be forfeited according to law.

Correctional Reform Act of 1983, ch. 131, § 8, 1983 Fla.Laws 442, 442-43 (codified at Fla.Stat. § 944.275 (1987)) [hereinafter the 1983 act]. Compared to the

1978 provisions, the 1983 act increased the amount of basic gain time inmates could earn for general good behavior from a three/six/nine day variable to ten days per month; the potential incentive gain time available to prisoners, however, decreased from thirty-seven to twenty days per month.

The department has applied the method of calculating gain time adopted in the 1983 act to all inmates -- including those convicted of offenses that occurred before the act's passage. *See* Fla.Admin. Code Ann. r. 33-11.0065 (1988) (making no distinction between pre- and post-act offenders). The State admits that under the 1978 gain time system, petitioner's estimated release date is September 13, 1995 and that under 1983 act, petitioner's estimated release date is April 5, 1997.

II.

[1] Our decision in this case is controlled by the principles announced by the Supreme Court in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In that case, the Court was also faced with legislative alterations to the method by which the department calculated gain time for Florida prisoners. Under a 1963 Florida statute, gain time was awarded as follows:

> (1) The [department] shall grant the following deduction for gain time from the sentences of every prisoner who has committed no infraction of the rules or regulations of the board or the division, or of the laws of the state, and who has performed in a faithful, diligent, industrious, orderly, and peaceful manner, the work, duties, and tasks assigned to him, to-wit:

> Five (5) days per month off the first and second years of his sentence;
>
> Ten (10) days per month off the third and fourth years of his sentence; and
>
> Fifteen (15) days per month off the fifth and all succeeding years of his sentence. . . .

Act of May 31, 1963, ch. 243, § 1, 1963 Fla.Laws 547, 548 (codified, as amended, at Fla.Stat. § 944.27(1)(1963-1977)) [hereinafter the 1963 act]. In 1978, this five/ten/fifteen day scheme was changed to the three/six/nine days system described above. *See* Act of June 16, 1978, ch. 304, § 1, 1978 Fla.Laws 870, 870-71. A Florida prisoner challenged the constitutionality of the 1978 gain time provision, claiming that the law was *ex post facto* as applied to individuals

such as himself who committed offenses before the effective date of the 1978 act. The Court agreed, concluding that "the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against *ex post facto* laws." *Weaver*, 450 U.S. at 35-36, 101 S.Ct. at 968 (footnote omitted).

Although the facts in *Weaver* are on all fours with the facts of the instant case, the State makes three arguments as to why the 1983 act is not *ex post facto* as applied to the petitioner. We consider them in turn.

A.

The State first advances several arguments that attempt to distinguish between the unconstitutional provisions of the

1978 act, which reduced the amount of *basic* gain time available to inmates, and the provisions of the 1983 act, which reduce the availability of *incentive* gain time. These arguments center on the State's contention that basic gain time is "automatic," while incentive gain time is "discretionary."

1.

[2] The State contends that basic gain time is fundamentally different than incentive gain because basic gain time is automatically earned by prisoners, while incentive gain time is earned only at the discretion of prison officials. Because incentive gain time is discretionary in nature, the State contends that petitioner has no right to receive incentive gain time and that the State therefore can alter the method by which incentive gain time is calculated without violating

the *ex post facto* clause of the Constitution.[5] Because we believe that both basic and incentive gain time are discretionary in nature, we do not find the State's argument to be persuasive.[6]

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[5] We note that "a law need not impair a 'vested right' to violate the *ex post facto* prohibition." *Weaver*, 450 U.S. at 29, 101 S.Ct. at 964 (footnote omitted). Thus, the Supreme Court has noted that:

> Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even is a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Id. at 30-31, 101 S.Ct. at 965 (footnote omitted).

[6] We agree, of course, that incentive gain time is discretionary. We note, however, that this discretion is not complete. Thus, for example, the State does not contend that a prisoner who has performed his work in an outstanding manner can legally be denied incentive gain time

An examination of the statutory language authorizing basic gain time reveals that a prisoner must satisfy certain conditions in order to receive basic gain time and that the department is the judge of whether those conditions have been met. Thus, the 1963 act provided that basic gain time would be awarded only to prisoners who performed their duties "in a faithful, diligent, industrious, orderly, and peaceful manner." Act of May 31, 1963, ch. 243, § 1, 1963 Fla.Laws at 548. Similarly, the 1978 act allowed the department to award basic gain time only if the prisoner "performed in a satisfactory and acceptable manner the work, duties, and tasks assigned." Act of June 16, 1978, ch. 304, § 1, 1978 Fla.Stat. at

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for that work, despite its so-called "discretionary" nature. *See Pettway v. Wainwright*, 405 So.2d 1279 (Fla.Dist. Ct.App.1984)

870. Finally, we note that although the 1983 act does automatically give prisoners ten days of gain time, that gain time can be forfeited if, among other things, the prisoner "neglect[s] to perform the work, duties, and tasks assigned to him in a faithful, diligent, industrious, orderly, and peaceful manner." Fla.Stat. § 944.275(2)(a)(1987).[7]

We see no fundamental distinction between the conditions that a prisoner must satisfy to receive basic gain time and the conditions that a prisoner must satisfy to earn discretionary gain time. In both cases, the department decides in its sole discretion whether the prisoner has behaved well enough or worked diligently enough to earn gain time. We

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[7] Thus, the 1983 act merely alters the mechanism by which the State exercises its discretion with regard to basic gain time.

therefore reject the State's attempt to distinguish the 1983 act from the 1978 act at issue in *Weaver* by a supposed distinction between the nature of basic and incentive gain time.

2.

In a second argument, the State contends that incentive gain time is discretionary because the duties that allow a prisoner to earn such gain time are a matter of legislative grace. *See, e.g., Newman v. Alabama*, 559 F.2d 283, 292 (5th Cir.1977)(Constitution does not mandate that states provide inmates with work.). We agree that in this sense incentive gain time could be characterized as discretionary.[8] Such a characterization, however, does not prevent the 1983 act

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[8] Of course, since the State has no constitutional obligation to give inmates gain time at all, the basic gain time at issue in *Weaver* was also discretionary in this sense.

from being *ex post facto* as applied to the petitioner.[9]

In *Weaver*, the Supreme Court stated clearly that "even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [*ex post facto* clause] if it is both retrospective and more onerous than the law in effect on the date of the offense." *Weaver*, 450 U.S. at 30-31, 101 S.Ct. at 965 (footnote omitted). Thus, even though the opportunity to earn incentive gain time is dependent on the grace of the legislature and the availability of jobs, we conclude that if the State affords its inmates such work, it is

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[9] The State does not contend that petitioner is incarcerated in a facility in which work is not offered to inmates or in which work is not available. In such a situation, of course, a prisoner would not be harmed by the application of the 1983 act and therefore would have no claim under the *ex post facto* clause.

bound to reward prisoners for their services at a gain time rate at least equally advantageous to that in effect at the time of those prisoners' offenses.

3.

In a third attempt to distinguish between basic and incentive gain time, the State notes that once the department has determined, in its discretion, that a prisoner has performed his duties in a satisfactory manner, the department has no discretion as to the *amount* of basic gain time merited by the performance of those duties.[10] With regard to incentive gain time, however, the State notes that

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10 Thus, under the 1978 act the State *must* award a well-behaving prisoner either three, six, or nine days of basic gain time, depending on how long the prisoner has been incarcerated. *See* Act of June 16, 1987, ch. 304, § 1, 1978 Fla.Laws at 870. Similaryly, the Department *must* award a well-behaving prisoner ten days of basic gain time under the 1983 act. *See* Fla.Stat. §944.275(4)(a) (1987).

the department has discretion to determine both whether the prisoner has performed his duties in a diligent or exceptional manner and the amount of incentive gain time that the prisoner's performance merits. Relying on this distinction, the State argues that since the petitioner may never perform his duties in a manner that would make him eligible for the greater amount of incentive gain time previously available under the 1978 act, any disadvantage to the petitioner is too speculative to constitute a violation of the *ex post facto* clause.

We agree that a prisoner may be less likely to earn incentive gain time than basic gain time.[11] Under *Weaver*, how-

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[11] Although we have noted that both basic and incentive gain time are discretionary in nature, the department clearly awards basic gain time much more readily than incentive gain time. Thus, an inmate earns basic gain time "simply for avoiding disciplinary infractions and

ever, we are not to speculate as to whether an individual prisoner's future behavior will result in an increased term of incarceration under the new gain time provision. Instead, the decision requires us to examine whether a prisoner is "disadvantaged by the reduced *opportunity* to shorten his time in prison." *Id.* at 33-34, 101 S.Ct. at 967 (emphasis added). Thus, even though, in fact, petitioner may not so diligently perform his assigned duties as to earn the full thirty-seven days of incentive gain time previously available under the 1978 act,

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performing his assigned tasks." *Weaver*, 450 U.S. at 35, 101 S.Ct. at 968. Incentive gain time, however, is subject to a higher standard: a prisoner must diligently participate in positive activities, such as institutional labor, vocational training, academic studies, or other rehabilitative programs. *See* Fla.Stat. § 944.275(4)(b) (1987); Act of June 16, 1978, ch 304, § 1, 1978 Fla.Laws at 871 (codified at Fla.Stat. § 944.275 (2)(b), (3)(a) (1981)).

the elimination of the opportunity to do so is sufficient to make the 1983 act *ex post facto* as applied to petitioner.

B.

As it second argument, the State contends that the 1983 act does not violate the Constitution's prohibition against *ex post facto* laws because the 1983 provision does not disadvantage the petitioner when compared *in toto* with the 1978 act.[12]

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12 In *Weaver*, the Supreme Court apparently agreed that the federal courts must examine a challenged act as a whole in determining whether it is unconstitutionally *ex post facto*. , *See Weaver*, 450 U.S. at 31-32, 101 S.Ct. at 965 (looking at 1978 act as a whole); *id.* at 37-38, 101 S.Ct. 969 (Rehnquist, J., concurring)(specifically noting that a challenged act must be viewed *in toto*). In the context of the instant dispute, the State asks us to agree that the opportunity to earn ten days of basic gain time and twenty days of incentive gain time under the 1983 act is worth the opportunity to earn three, six, or nine days of basic gain time under the 1978 act. As an abstract proposition, of course, such a conclusion is impossible to draw because it requires us to weigh apples against oranges. Moreover, the

Specifically, the State argues that the increased allotment of basic gain time available under the 1983 act compensates for any reduction in the amount of incentive gain time previously available under the 1978 act.[13] We disagree.

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case or controversy requirement requires us to avoid such abstract determinations precisely because they raise adjudicative difficulties. *See* U.S. Const. art. III, § 2.

[13] In *Weaver*, the Court faced a similar argument: Florida argued that the increased incentive gain time available under the 1978 act compensated for the reduction of basic gain time for good conduct. The Court rejected this trade-off, noting as follows:

> [N]one of these provisions for extra [incentive] gain time compensates for the reduction of gain time available solely for good conduct. The fact remains that an inmate who performs satisfactory works and avoids disciplinary violations could obtain more gain time per month under the [1963 act] than he could for the same conduct under the [1978 act]. To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions. Even then, the award of the extra gain

We recognize that an inmate who performs his duties in only an adequate manner may be better off under the 1983 act -- such a prisoner will receive more basic gain time, and is not injured by the elimination of incentive gain time previously awarded only for diligent or outstanding job performance. For purposes of our *ex post facto* analysis in this case, however, this fact is irrelevant.[14]

> time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such a saving a life or diligent performance in an academic program. In contrast, under both the new and old statutes, an inmate is automatically entitled to the monthly gain time simply for avoiding disciplinary infractions and performing his assigned tasks.

Weaver, 450 U.S. at 35, 101 S.Ct. at 967-68 (footnote & citation omitted).

[14] For example, on the facts of *Weaver*, we note that a prisoner who performed his duties in a diligent or exceptional manner would have been better off under the 1978 act than the 1963 act. Such a

Under *Weaver*, we need not conclude that a new law disadvantages *every* prisoner or the *average* prisoner; instead, our analysis centers on whether the new law disadvantages the particular prisoner who is now before the court. *See Weaver*, 450 U.S. at 33-34, 101 S.Ct. at 966-67.

Comparing the 1983 act *in toto* with the 1978 act, we note that under the 1983 act petitioner loses the opportunity to earn seventeen extra days of incentive gain

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prisoner would receive up to forty-six days of gain time per month, instead of the fifteen days per month allowed under the 1963 act. If the Court in *Weaver* had been concerned with the constitutionality of the statute as appliled to prisoners in general, this fact would, of course, been very relevant. The *Weaver* Court, however, was not concerned wtih whether the 1978 act disadvantaged prisoners as a whole; instead, the Court was concerned only with the effect of the 1978 act on the individual prisoner before it. Given this focus, the effect of the 1983 act on a prisoner who performs his duties only adequately is a irrelevant to our decision in this case as was the effect of the 1978 act on a diligent prisoner in *Weaver*.

time, in exchange for which he receives one extra day of basic gain time.[15] As a result, petitioner's tentative release date under the 1978 act is more than one and one-half years earlier than under the 1983 act. Given this information, we have no doubt that the 1983 act is more onerous than the 1978 act.

C.

In its third challenge, the State maintains that in passing the 1978 act, the Florida legislature allowed inmates an increased amount of discretionary gain time in order to offset the reductions in automatic gain time effected by this act. The Supreme Court having found this offset unconstitutional as applied to prisoners convicted of offenses occur-

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[15] Petitioner has been incarcerated since June 15, 1983; therefore, under the 1978 act petitioner would accrue nine days per month of basic gain time. *See* Fla.Stat. § 944.275(1)(c)(1981).

ring before the act's passage, the State contends that the Florida legislature now should be entitled to withdraw these increased benefits. This argument is frivolous. Although we recognize that Florida might not have enacted the 1978 statute had the legislature known that the law would be *ex post facto* as applied to pre-1978 offenders, the Florida legislature did, in fact, enact these provisions. The federal courts recognize no doctrine of "constitutional mistake" that can absolve a legislature from the consequences of a misapprehension concerning a statute's constitutionality. Thus, the fact that the Florida legislature did not realize that the 1978 act would be *ex post facto* by no means prevented the rights guaranteed by the 1978 act from vesting in individuals sentenced for offenses committed after the statute's effective date.

III.

In sum, we conclude that the provisions of Fla.Stat. § 944.275 (1987) that allow prisoners to earn only twenty days per month of incentive gain time constitute an unconstitutional *ex post facto* law as applied to petitioner.[16] The district court's decision granting petitioner a writ of habeas corpus is therefore

AFFIRMED.

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[16] The effect of our decision, of course, is to require that the State of Florida "apply, if possible, the law in place when [defendant's] crime occurred." *Weaver*, 450 U.S. at 36 n. 22, 101 S.ct. at 968 n. 22. In doing so, the State must determine whether the unconstitutional provisions of the 1983 act are severable. If so, petitioner will reap the benefit of increased basic gain time provided by the 1983 act, while also receiving the benefit of thirty-seven days of incentive gain time provided by the 1978 act. If not, petitioner's sentence will be completely regulated by the terms of the 1978 act. These matters, however, are purely questions of state law, which must be resolved by the Florida courts.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JEFFREY RASKE,

Petitioner,

vs. Case No. 87-779-Civ-Orl-18

BOB MARTINEZ, et al.,

Respondents.

ORDER

This cause came on for consideration of a petition for writ of habeas corpus filed by Jeffrey Raske, a prisoner of the State of Florida. Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Thereafter, the Respondents filed a timely reply to the petition for writ of habeas corpus in compliance with this Court's instructions and The Rules Governing §2254 Cases in the United States District Courts.

I. Statement of Case and Facts

The relevant facts are undisputed. The Petitioner was sentenced in the circuit court in and for Broward County, Florida to three concurrent twenty-five year terms of incarceration for robbery offenses that occurred in 1982. In addition, the Petitioner was sentenced by the circuit court in and for Palm Beach County, Florida to serve a three and one-half year concurrent prison term for a robbery that occurred in 1982. The Petitioner was received into the Florida Department of Corrections on June 15, 1983 and is presently incarcerated in the Florida prison system at Avon Park Correctional Institution, Avon Park, Florida. The Petitioner's presumptive parole release date is presently set for October 22, 1997.

The state statute in place on the date of all the robbery offenses and the date of the sentencing for the three Broward County robberies provided a formula for calculating work-gain-time credits as follows:

> (2)(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of this state and who has accomplished, in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of diligence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.
>
> * * *
>
> (3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him, against whom no disciplinary report has been filed within the preceding 6 months, and whose conduct, personal adjustment, and individual effort towards his own rehabi-

> litation show his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study may be granted, on an individual basis, from 1 to 6 days per month extra gain-time to be deducted from the term of his sentence.

Florida Statutes §944.275(2)(a), (3)(a) (1981).

In 1983 the Florida Legislature amended section 944.275 so that prisoners could earn a maximum of twenty (20) days per month if he works diligently, participates in training, uses time constructively, or otherwise engages in positive activities. See Fla. Stat. §944.275(4)(b) (1983). Under the terms of the amended statute, the total amount of gain-time that can be earned by a prisoner is reduced to 20 days per month rather than the potential 37 days per month allowed under the 1981 statute.

The State of Florida has applied the 1983 amendment not only to prisoners sentenced for crimes since the statute's enactment in 1983, but also to all other prisoners including the Petitioner, whose offenses took place before the effective date of the 1983 amendment. The Petitioner filed a petition with the Florida Department of Administrative Hearings challenging the new statutory amendment as being an unconstitutional ex post facto law as applied to the Petitioner. The petition was dismissed and the Petitioner appealed. The Florida District Court of Appeals affirmed the dismissal of the petition without written opinion. Raske v. Department of Corrections, 492 So.2d 1336 (Fla. App. 1986). In the instant petition for writ of habeas corpus, the Petitioner challenges the application of Florida Department of Corrections Rule

33-11.065, which implements Florida Statute §944.275 (1983), as an ex post facto law as applied to the Petitioner.

II. Merits

The United States Constitution contains two ex post facto clauses, one applicable to the states, article 1, section 10, clause 1, and one to the federal government, article 1, section 9, clause 3. In this case, the Court is called upon to address the ex post facto clause applicable to the states: "No state shall . . . pass any . . . ex post facto law."

The Supreme court has held that three critical elements must be present to establish an ex post factor clause violation. First, the statute must be a penal or criminal law. Second, the statute must apply retrospectively. Finally, the statute must be disadvantageous to the offender because it may impose

greater punishment.[1] Weaver v. Graham, 450 U.S. 24 (1981). A law may violate the ex post facto prohibition even if it "merely alters penal provisions accorded by the grace of the legislature." Id. at 30-31. The challenged statute need not "impair a vested right" in order to be found violative of the ex post facto clause. Id. A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively. Id. at 32-33 &

[1] In assessing whether a provision is disadvantageous, courts must look to the circumstances that may have mitigated its effect on the particular individual. Weaver v. Graham, 450 U.S. 24, 33 (1981); Dobbert v. Florida, 432 U.S. 282, 300 (1977). Ex post facto analysis "is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." Weaver, 450 U.S. at 30 n. 13. In other words, the legislature must provide punishment for past conduct. See Flemming v. Nestor, 363 U.S. 603 (1960).

n. 17. See Dobbert v. Florida, 432 U.S. 282, 293 (1977)("even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."). With these principles in mind, the Court will consider whether Petitioner has stated an ex post facto claim.

The Petitioner relies on the Supreme Court's 1981 decision in Weaver v. Graham, supra, for the proposition that Florida Statute §944.275 is an unconstitutional ex post facto law as applied to the Petitioner. Weaver involved repeal of a state statute mandating certain nondiscriminatory, automatically calculated deductions from a prisoner's sentence as "gain time" deductions. 450 U.S. at 26-27. A prisoner whose offense and sentencing predated the new law claimed that the application of that law to him violated the Constitution's prohi-

bition against ex post facto laws. The Supreme Court agreed, stating that as applied the new law "makes more onerous the punishment for crimes committed before its enactment." Id. at 36. Because there was no discretion in awarding the mandated gain time once a prisoner abides by prison rules and performs assigned tasks in a satisfactory manner, the change in the formula by which that time was calculated automatically lengthened the term of incarceration for prisoners who obeyed the institutional rules. 450 U.S. at 34-36.

The Respondents argue that the 1983 amendment to section 944.275, altering the availability of gain-time, is not retrospective because, on its face, the amendment applies only after its effective date. The Weaver decision is controlling on this point.

In Weaver v. Graham, supra, the Supreme Court held as follows:

> The respondent maintains that Florida's law altering the availability of gain-time is not retrospective because, on it face, it applies only after its effective date. This argument fails to acknowledge that it is the effect, not the form, of the law that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether Fla. Stat. §944.275(1) (1979) applies to prisoners convicted for acts committed before the provision's effective date. The respondent concedes that the State uses §944.275(1), which was implemented on January 1, 1979, to calculate gain time available to petitioner, who was convicted of a crime occurring on January 31, 1976. Thus, the provision attaches legal consequences to a crime committed before the law took effect. (footnote omitted).

450 U.S. at 31.

> For prisoners who committed crimes before its enactment, §944.275(1) substantially alters the consequences attached to a crime already completed, and therefore changes the quantum of

> punishment. Therefore, it is a retrospective law which can be constitutionally applied to petitioner only if it is not to his detriment. (citations omitted).

450 U.S. at 32-33.

In the instant case, although the Florida statute on its face applies only after its effective date, it is undisputed that the statute is used to calculate the gain-time available to prisoners, such as the Petitioner, convicted for acts committed before the statute's effective date. The statute, therefore, substantially alters the consequences attached to a crime already completed by changing the quantum of punishment. Weaver, 450 U.S. at 31-33. Thus, Florida Statutes §944.275 (1983) "is a retrospective law which can be constitutionally applied to the Petitioner only if it is not to his detriment." Weaver, 450 U.S. at 33.

"Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." Weaver, 450 U.S. at 33. "The inquiry looks to the challenged provision, and not to any particular individual." Id. Under this inquiry, the Court concludes that the amended statute is disadvantageous to the Petitioner and other similarly situated prisoners.

The 1983 amendment to section 944.275 clearly reduces the potential number of gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. Consequently, the reduction in gain-time credits actually lengthens the period that someone in Petitioner's position must spend in prison, thereby causing disadvantage to the Petitioner, and others similarly situated. See Weaver, 450 U.S. at 33-34.

The Respondents argue, however, that Weaver is not applicable to the facts of the instant case because the gain-time statute in Weaver involved automatic gain-time awards whenever a prisoner maintained good conduct for a prescribed period of time. According to Respondents, section 944.275 provides for gain-time that is contingent on both the wishes of the correctional authorities and special behavior by the inmate. Thus, the Respondents urge that the potential for earning gain-time prior to the 1983 amendment was speculative and did not affect the quantum of punishment which can be assessed at the time a crime is committed.

The Respondents cite no authority for the proposition that former section 944.275 provides for purely discretionary gain-time awards as opposed to providing

for mandatory gain-time awards once the prisoner has completed his assigned job in a satisfactory manner, and has maintained an acceptable level of good conduct. Indeed, even though Florida courts have interpreted §944.275 as being optional, it is mandatory for the Department of Corrections to uniformly award incentive gain-time unless there is some justification or authority for classifying and treating some prisoners differently than others. See Pettway v. Wainwright, 450 So. 2d 1279 (Fla. App. 1984). Additionally, the Court notes that the procedure for awarding statutory gain-time in this case is no more discretionary than was the procedure for awarding gain-time in Weaver v. Graham, supra. That is, the statutory changes involved in this case are almost identical to the statutory changes under review in the Weaver case.

In Weaver, the Supreme Court held that the gain-time statute was disadvantageous to the petitioner because, on its face, the statute reduced the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. 450 U.S. at 33-34. The situation in this case is identical. On its face, Fla. Stat. §944.275 (1983) reduces the number of gain-time credits available to an inmate who abides by prison rules and the laws of the State of Florida, and who satisfactorily completes assigned work tasks. Compare, Weaver, 450 U.S. at 343-34. As in Weaver, "[t]he fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain-time per month under the repealed provisions, [§944.275 (1981)], than he could for the same con-

duct under the new provisions, [§944.275 (1983)]." Id. at 35. Thus, the 1983 amendment to section 944.275 constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. See Id. at 35-36. This result causes Florida Statute §944.275 (1983) to run afoul of the prohibition against ex post facto laws.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. Florida Statute §944.275(4)(b) (1983), limiting the amount of gain-time that can be earned to twenty (20) days per month, is void as applied to the Petitioner, whose crimes occurred before the statute's effective date.

2. The judgment of the Florida First District Court of Appeals in Raske v. Department of Corrections, 492 So. 2d 1336 (Fla. 1st DCA 1986) is reversed and this case

remanded for further proceedings not inconsistent with this opinion.[2]

3. The Petitioner's Motion for an Evidentiary Hearing is hereby DENIED.

DONE AND ORDERED in Chambers at Orlando, Florida, this 12 day of January, 1988.

/s/
G. KENDALL SHARP
UNITED STATES DISTRICT JUDGE

Copies to:
Jeffrey Raske
Susan A. Maher, Esquire
Florida First District Court of Appeals
Pro Se Law Clerk

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[2] The United States Supreme Court in Weaver v. Graham, 450 U.S. at 36 n.22, held:

> The proper relief upon a conclusion that a state prisoner is being treated under an ex post facto law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred. In remanding for this relief, we note that only the ex post facto portion of the new law is void as to petitioner and therefore any severable provisions which are not ex post facto may still be applied to him. (Citations omitted).

UNITED STATES CONSTITUTION

ARTICLE I

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay an Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Contract with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

944.275 Gain-time.--

(1) The department shall grant the following deductions for gain-time on a monthly basis, as earned, from the sentence of every prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has performed in a satisfactory and acceptable manner the work, duties, and tasks assigned, as follows:

(a) Three days per month off the first and second years of the sentence;

(b) Six days per month off the third and fourth years of the sentence; and

(c) Nine days per month off the fifth and all succeeding years of the sentence;

and the prisoner shall be entitled to credit for a month as soon as the

prisoner has served such time as, when added to the deduction allowable, would equal a month.

(2)(a) It is the intent of the Legislature that work programs be recognized as an integral part of the rehabilitative process and that gain-time under this section be awarded only if earned as provided herein.

(b) The department is authorized to grant additional gain-time allowances on a monthly basis, as earned, up to 1 day for each day of productive or institutional labor performed by any prisoner who has committed no infraction of the rules of the department or of the laws of the state and who has accomplished, in a satisfactory and acceptable manner, the work, duties, and tasks assigned. Such gain-time allowances under this section shall be awarded on the basis of dili-

gence of the inmate, the quality and quantity of work performed, and the skill required for performance of the work.

(c) The amount of time in a work program equivalent to 1 day shall be determined by the department. The department may provide for the award of gain-time under this subsection on a fractional basis for less than 1 day's participation in a work program.

(d) Any prisoner who, without approval, refuses or neglects to perform the work, duties, and tasks assigned in the correctional work program shall forfeit gain-time as provided in s. 944.28.

(e) The department may grant additional gain-time allowances up to 6 days per month for any inmate who, because of age, illness, infirmity, or confinement for reasons other than discipline, does

not participate in a correctional work program, who demonstrates a constructive utilization of time, and who has committed no infraction of the rules of the department or laws of the state. However, no prisoner shall receive additional gain-time credits under both paragraph (b) and this paragraph during the same month.

(3)(a) An inmate who faithfully performs the assignments given to him in a conscientious manner over and above that which may normally be expected of him, against whom no disciplinary report has been filed within the preceding 6 months, and whose conduct, personal adjustment, and individual effort towards his own rehabilitation shows his desire to be a better than average inmate or who diligently participates in an approved course of academic or vocational study may be

granted, on an individual basis, from 1 to 6 days per month extra gain-time to be deducted from the term of his sentence.

(b) An inmate who does some outstanding deed, such as the saving of a life or assisting in recapturing an escaped inmate, or who in some other manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence, may be granted special gain-time on the basis of from 1 to 60 days.

(4) When a prisoner is under two or more concurrent sentences, the prisoner shall be allowed gain-time as if such sentences were all one sentence; and the prisoner's gain-time, including any additional gain-time allowed under subsection (2) and extra gain-time allowed under subsection (3), shall be subject to forfeiture as though sentences were all one sentence.

(5) No gain-time shall be awarded except as provided in this section.

944.275 Gain-time.--

(1) The department is authorized to grant deductions from sentences in the form of gain-time in order to encourage satisfactory prisoner behavior, to provide incentive for prisoners who perform outstanding deeds or services.

(2)(a) The department shall establish for each prisoner sentenced to a term of years a "maximum sentence expiration date," which shall be the date when the sentence or combined sentences imposed on a prisoner shall expire. In establishing this date, the department shall reduce the total time to be served by any time lawfully credited.

(b) When a prisoner with an established maximum sentence expiration date is sentenced to an additional term or

terms without having been released from custody, the department shall extend the maximum sentence expiration date by the length of time imposed in the new sentence or sentences, less lawful credits.

(c) When an escaped prisoner or a parole violator is returned to the custody of the department, the maximum sentence expiration date in effect when the escape occurred or the parole was effective shall be extended by the amount of time the prisoner was not in custody plus the time imposed in any new sentence or sentences, but reduced by any lawful credits.

(3)(a) The department shall also establish for each prisoner sentenced to a term of years a "tentative release date" which shall be the date projected for the prisoner's release from custody by virtue of gain-time granted or for-

feited as described in this section. The initial tentative release date shall be determined by deducting basic gain-time granted from the maximum sentence expiration date. Other gain-time shall be applied when granted or restored to make the tentative release date proportionately earlier; and forfeitures of gain-time, when ordered, shall be applied to make the tentative release date proportionately later.

(b) When an initial tentative release date is reestablished because of additional sentences imposed before the prisoner has completely served all prior sentences, any gain-time granted during service of a prior sentence and not forfeited shall be applied.

(c) The tentative release date may not be later than the maximum sentence expiration date.

(4)(a) As a means of encouraging satisfactory behavior, the department shall grant basic gain-time at the rate of 10 days for each month of each sentence imposed on a prisoner, subject to the following:

1. Portions of any sentences to be served concurrently shall be treated as a single sentence when determining basic gain-time.

2. Basic gain-time for a partial month shall be prorated on the basis of a 30-day month.

3. When a prisoner receives a new maximum sentence expiration date because of additional sentences imposed, basic gain-time shall be granted for the amount of time the maximum sentence expiration date was extended.

(b) For each month in which a prisoner works diligently, participates in train-

ing, uses time constructively, or otherwise engages in positive activities, the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly.

(c) An inmate who performs some outstanding deed, such as saving a life or assisting in recapturing an escaped inmates, or who in some manner performs an outstanding service that would merit the granting of additional deductions from the term of his sentence may be granted from the term of his sentence may be granted meritorious gain-time of from 1 to 60 days.

(5) When a prisoner is found guilty of an infraction of the laws of this state or the rules of the department, gain-time may be forfeited according to law.

(6)(a) Basic gain-time under this section shall be computed on and applied to

all sentences imposed for offenses committed on or after July 1, 1978.

(b) On the effective date of the act, all incentive and meritorious gain-time shall be granted according to the provisions of this act.

(c) All additional gain-time previously awarded under former subsections (2) and (3) and all forfeitures ordered prior to the effective date of this act shall remain in effect and be applied in establishing an initial tentative release date.

(7) The department shall promulgate rules to implement the granting, forfeiture, and restoration of gain-time.

Rule 33-11.065

33-11.065 Work Gain Time.

(1) Eligibility - Any inmate at any institution or facility of the Department is eligible for work gain time, regardless of the stage of processing, if the inmate has not violated any rules of the Department or laws of the state and has accomplished in a satisfactory and acceptable manner the work, duties and tasks assigned. Inmates assigned to academic or vocational programs are eligible for work gain time while producing a product or service.

(2) Credits Applied.

(a) Work days shall be divided into two half days, and an inmate shall be considered to have worked all of any half day period if he has worked more than half of that period.

(b) The immediate work supervisor of each inmate will review objectively the inmate's total work participation, credit the inmate with either a full or half day of work and record the information on the monthly (work) gain time award form. The Classification Team will obtain evaluation reports at the end of each month or when the inmate changes programs from all officials whose decisions should be considered in awarding work gain time and will combine multiple evaluation reports for any month into an overall monthly rating.

(c) Attributes which will be evaluated separately in determining an award of work gain time are quality, quantity, diligence and skill required. Each attribute will be rated either unsatisfactory, satisfactory, above satisfactory or outstanding.

(d) Based on the four evaluations provided in paragraph (c) above, an overall performance evaluation of unsatisfactory, satisfactory, above satisfactory or outstanding shall be assigned to the inmate's job performance. Gain time awards for work will correspond to the overall performance evaluation in the following proportions:

1. Unsatisfactory - zero days.

2. Satisfactory - 1/2 day gain time for each day of work.

3. Above satisfactory - 3/4 day gain time for each day of work.

4. Outstanding - One day of gain time for each day of work.

Specific Authority 20.315, 944.09, 945.11 FS. Law Implemented 20.315, 944.09, 944.11 (1973), 944.275, 944.11 FS. History - New 2-26-80, Amended.

FLORIDA DEPARTMENT OF CORRECTIONS

POLICY AND PROCEDURE DIRECTIVE

4.07.24 6/23/82 (Revised 7-12-82)

Part VII WORK GAIN TIME:

A. Eligibility (Also See Section IV)

1. An inmate in any facility of the Department and in any stage of processing who has committed no infraction of the rules of the Department or the laws of this State and who has accomplished in a satisfactory and acceptable manner the work, duties, and tasks assigned may earn up to one day of Work Gain Time for each day of productive and acceptable work performance.

B. How Credited

1. If an inmate is otherwise elig-

ible, the inmate's immediate work supervisor will objectively review the inmate's total work participation, note credit for either a half day or full day of work and record this information on the Monthly Gain Time Award form. An inmate will be credited with a half day or a full day credit if the inmate was actually on the job for the major portion of that time.

2. Evaluation reports should be obtained from all pertinent areas that would have a bearing on the decisions to be made in regard to gain time to be awarded. If more than one report is received in any one month, they should be combined by the Classification Team into one overall rating.

3. Those aspects of performance to be evaluated in awarding Work Gain Time monthly are quality, quantity, diligence, and skill required (applied). Each area will be rated either:

   a. Unsatisfactory - meaning performance that does not meet minimum requirements. This rating equals zero days gain time.

   b. Satisfactory - meaning average or normal performance that meets minimum requirements. This rating equals 1/2 day gain time for each day worked.

   c. Above Satisfactory - meaning performance that exceeds that what is expected.

This rating equals 3/4 day gain time for each day worked.

d. Outstanding - meaning performance in which there is very little room for improvement. This rating equals one (1) day gain time for each day worked.

C. When Processed

At the end of each month or upon each program change, the immediate supervisor will forward the original copy of the Monthly Gain Time Award form to the Classification Department. A duplicate copy may be retained by the supervisor.